Canadian International Trade Tribunal
Tribunal canadien du commerce extérieur

CANADIAN INTERNATIONAL TRADE TRIBUNAL

Procurement

DECISION AND REASONS

File PR-2022-051

CJV Petro Air Services/2553-4330 Québec Inc.

Decision made
Monday, October 31, 2022

Decision and reasons issued
Wednesday, November 9, 2022

IN THE MATTER OF a complaint filed pursuant to subsection 30.11(1) of the *Canadian International Trade Tribunal Act*.

BY

CJV PETRO AIR SERVICES/2553-4330 QUÉBEC INC.

AGAINST

THE DEPARTMENT OF PUBLIC WORKS AND GOVERNMENT SERVICES

DECISION

Pursuant to subsection 30.13(1) of the *Canadian International Trade Tribunal Act*, the Canadian International Trade Tribunal has decided not to conduct an inquiry into the complaint.

Georges Bujold

Georges Bujold
Presiding Member

STATEMENT OF REASONS

[1] Subsection 30.11(1) of the *Canadian International Trade Tribunal Act*[1] (CITT Act) provides that, subject to the *Canadian International Trade Tribunal Procurement Inquiry Regulations*[2] (Regulations), a potential supplier may file a complaint with the Canadian International Trade Tribunal concerning any aspect of the procurement process that relates to a designated contract and request the Tribunal to conduct an inquiry into the complaint. Subsection 30.13(1) of the CITT Act provides that, subject to the Regulations, after the Tribunal determines that a complaint complies with subsection 30.11(2) of the CITT Act, it must decide whether to conduct an inquiry into the complaint.

SUMMARY OF THE COMPLAINT

[2] This complaint concerns a Request for Proposal (RFP) (solicitation W6889-20127) issued by the Department of Public Works and Government Services (PWGSC) on behalf of the Department of National Defence (DND) for snow and ice control services at the Petawawa aerodrome.

[3] The complainant, CJV Petro Air Services/2553-4330 Québec Inc. (PAS), alleges that the winning bidder, H&H Construction Inc. (H&H) does not have the minimum experience of runway snow removal required by Mandatory Technical Criterion 2. PAS also submits that H&H does not have the equipment required to implement the contract awarded to H&H by PWGSC.[3]

[4] As a remedy, PAS requests that a new solicitation be issued, that bids be re-evaluated, that the contract with H&H be terminated, and that the contract be awarded to PAS. PAS also requests reimbursement of the costs associated with its complaint and with preparing the bid.[4]

[5] The Tribunal decided not to inquire into the complaint. For the reasons that follow, the Tribunal finds that PAS's first ground of complaint was not filed within the time limits set out in section 6 of the Regulations. With respect to the second ground of complaint, the Tribunal finds that it is a matter of contract administration, which goes beyond the scope of the Tribunal's jurisdiction.

BACKGROUND

[6] On June 10, 2022, PWGSC published the RFP in question on the CanadaBuys website.[5] The bid closing date was October 11, 2022, at 2:00 p.m. EDT.

[7] On October 2, 2022, an amendment was made to Mandatory Technical Criterion 2 of the RFP. The amendment specified that the length of the Garrison Petawawa aerodrome was 3,434 ft and that the minimum runway snow clearing experience required by the RFP was now 3,400 ft rather than 4,000 ft.[6]

[8] On October 5, 2022, PAS sent an email to PWGSC to inquire about this amendment. Specifically, PAS wished to confirm that the length indicated by PWGSC in its October 2, 2022,

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1 R.S.C., 1985, c. 47 (4th Supp.).
2 SOR/93-602.
3 Exhibit PR-2022-051-01 at 4–5.
4 *Ibid.* at 5–6.
5 *Ibid.* at 170–299.
6 *Ibid.* at 158.

amendment was not an error, considering that the length of the Garrison Petawawa aerodrome was 1,630 ft according to a Department of Transport publication.[7]

[9] On October 6, 2022, PWGSC confirmed that, according to its technical drawings, "the runway is 1,653 feet long, while the overrun is 1,781 feet long, for a total of 3,434 feet" [translation].[8]

[10] On or about October 11, 2022, PAS submitted a bid in response to the solicitation.

[11] On October 14, 2022, PWGSC sent a regret letter to PAS informing it that it was not selected as the winning bidder because it did not offer the lowest evaluated price. A contract was awarded to another bidder, H&H.[9]

[12] On October 25, 2022, PAS filed its complaint with the Tribunal.

[13] On October 26, 2022, the Tribunal requested additional information so that the complaint could be considered complete, pursuant to subsection 30.11(2) of the CITT Act. On the same day, PAS filed the requested information. Accordingly, pursuant to paragraph 96(1)(b) of the *Canadian International Trade Tribunal Rules*, the complaint was considered to have been filed on October 26, 2022.[10]

[14] On October 31, 2022, the Tribunal decided not to conduct an inquiry into the complaint.

ANALYSIS

[15] Pursuant to sections 6 and 7 of the Regulations, after receiving a complaint that complies with subsection 30.11(2) of the CITT Act, the Tribunal must determine whether the following four conditions are met before it can conduct an inquiry:

(i) the complaint has been filed within the time limits prescribed by section 6 of the Regulations;[11]
(ii) the complainant is a potential supplier;[12]
(iii) the complaint is in respect of a designated contract;[13] and
(iv) the information provided discloses a reasonable indication that the procurement has not been conducted in accordance with the relevant trade agreements.[14]

[16] In this case, the Tribunal finds that, with respect to PAS's first ground of complaint, the first condition was not met, as the complaint was not filed within the time limits set out in section 6 of the Regulations. With respect to the second ground of complaint, the Tribunal finds that it has no jurisdiction to inquire into a matter of contract administration.

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7 *Ibid.* at 164.
8 *Ibid.* at 168.
9 *Ibid.* at 330–331.
10 Exhibit PR-2022-051-01.B.
11 Subsection 6(1) of the Regulations.
12 Paragraph 7(1)(a) of the Regulations.
13 Paragraph 7(1)(b) of the Regulations.
14 Paragraph 7(1)(c) of the Regulations.

The first ground of complaint is time-barred

[17] Pursuant to subsections 6(1) and (2) of the Regulations, a potential supplier must either raise an objection with the procuring government institution or file a complaint with the Tribunal no later than 10 working days after the day on which the basis of the complaint became known or reasonably should have become known to the supplier. Further, a potential supplier who has made a timely objection to the procuring government institution and is denied relief may file a complaint with the Tribunal within 10 working days after the day on which the potential supplier has actual or constructive knowledge of the denial of relief.

[18] In this case, PAS submits that it filed an objection with the government institution, first by telephone on October 18, 2022, and then in writing on October 24, 2022,[15] as indicated in the information in the complaint form.[16]

[19] However, in the Tribunal's view, PAS's first ground of complaint that the winning bidder would not have the minimum runway snow removal experience of 3,400 ft in two consecutive years, as required by Mandatory Technical Criterion 2, is essentially based on the claim that PWGSC erred in determining that the length of the Garrison Petawawa aerodrome is 3,434 ft.[17] In fact, PAS contests that H&H was able to avail itself of its snow removal experience at Garrison Petawawa once the mandatory minimum experience was lowered by PWGSC on October 2, 2022 (the minimum experience was reduced from 4,000 ft to 3,400 ft).[18] This ground of complaint appears to be based on PAS's assumption that the Petawawa runway is 1,630 ft, rather than 3,434 ft.[19]

[20] In this regard, the Tribunal notes that, on October 5, 2022, PAS sent an email to PWGSC confirming that the length of the Garrison Petawawa aerodrome was 1,630 ft, as indicated in a Department of Transport publication,[20] not 3,434 ft, as indicated in the amendment to the PWGSC solicitation of October 2, 2022.[21]

[21] On October 6, 2022, PAS received an answer to its question, with PWGSC clearly indicating that the Petawawa aerodrome runway "is 1,653 feet long, while the runway overrun is 1,781 feet long, for a total of 3,434 feet"[22] [translation].

[22] There is no doubt, in the Tribunal's view, that PAS became aware of PWGSC's interpretation of Mandatory Technical Criterion 2 on October 6, 2022. If PAS intended to challenge this interpretation of the criterion, it should have done so "within 10 working days after the day on which [it had] actual or constructive knowledge of the denial of relief, if the objection was made within 10 working days after the day on which its basis became known or reasonably should have become known to [it]."[23]

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15 Exhibit PR-2022-051-01 at 4.
16 Exhibit PR-2022-051-01.B at 1–3.
17 Exhibit PR-2022-051-01 at 6.
18 *Ibid.* at 158.
19 *Ibid.* at 6, 164.
20 *Ibid.* at 166.
21 *Ibid.* at 164.
22 *Ibid.* at 168.
23 Subsection 6(2) of the Regulations.

[23] Considering this provision, the Tribunal concludes that PAS should reasonably have known how PWGSC would apply Mandatory Technical Criterion 2 as of October 6, 2022, and that its objection to the runway length selected by PWGSC had been refused that same day.

[24] PAS waited until October 25, 2022, to file its complaint on this ground. In this respect, the Tribunal notes that bidders must be vigilant and react as soon as they become aware or should reasonably have become aware of a flaw in the process. Potential bidders therefore cannot develop a wait-and-see approach. In *IBM Canada Ltd. v. Hewlett Packard (Canada) Inc.*,[24] the Federal Court of Appeal instructs the following:

> In procurement matters, time is of the essence.
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> …
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> Therefore, potential suppliers are required not to wait for the attribution of a contract before filing any complaint they might have with respect to the process. They are expected to keep a constant vigil and to react as soon as they become aware or reasonably should have become aware of a flaw in the process.
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> …
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> The Tribunal has made it clear, in the past, that complaints grounded on the interpretation of the terms of [a request for proposals] should be made within ten days from the moment the alleged ambiguity or lack of clarity became or normally ought to have become apparent.

[25] In light of the above, the Tribunal concludes that the deadline for filing a complaint with the Tribunal regarding PAS's first ground of complaint was 10 working days from the day on which PWGSC indicated how it would interpret Mandatory Technical Criterion 2, namely, October 21, 2022, 10 working days from October 6, 2022.

[26] Therefore, this ground of complaint is time-barred, and the Tribunal cannot conduct an inquiry.

[27] That said, even if the complaint had not been found to be untimely in this respect, PAS's first ground of complaint does not provide sufficient evidence that there is a reasonable indication of a breach of the applicable trade agreements. Under paragraph 7(1)(c) of the Regulations, the Tribunal may only inquire into a complaint if it discloses a reasonable indication that the procurement has not been conducted in accordance with the applicable trade agreements.

[28] PAS's first ground of complaint relates to H&H's experience and is supported only by allegations, not by evidence.[25] PAS implicitly alleges that H&H referred to its snow removal experience at Garrison Petawawa, where the runway would only be 1,630 ft[26] long rather than 3,434 ft,[27] to demonstrate that it had the minimum experience required by Mandatory Technical Criterion 2 of the solicitation in question.[28] This ground does not demonstrate, to a reasonable extent,

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24 2002 FCA 284.
25 Exhibit PR-2022-051-01 at 6.
26 As alleged by PAS, based on a Department of Transport publication. See Exhibit PR-2022-051-01 at 166.
27 As indicated by PWGSC in the solicitation.
28 Exhibit PR-2022-051-01 at 6.

a violation of trade agreements, as it is well established that complainants bear the burden of substantiating their allegations when they present their case to the Tribunal.[29]

[29] The Tribunal notes that there is no information on the record that suggests that PWGSC's determination that H&H's proposal is compliant with Mandatory Technical Criterion 2 is based in whole or in part on the experience that this company apparently gained in Petawawa. It is plausible that H&H's proposal included information on its relevant experience acquired at other aerodromes with a runway at least 3,400 ft long.

[30] In any event, in light of the amendment to the RFP and the clarification provided by PWGSC in response to PAS's question in this regard, all bidders knew, prior to the closing date of the solicitation, that PWGSC considered that the Petawawa aerodrome runway met the minimum length requirement of Mandatory Technical Criterion 2. Since PWGSC had informed bidders in advance of how it interpreted and would apply this mandatory technical criterion,[30] at the time of evaluating the proposals, it had to act accordingly and accept as valid the experience gained in Petawawa. Otherwise, PWGSC would have inappropriately amended the implementation of the evaluation criteria set out in the RFP. Thus, even assuming that H&H's proposal was found to be compliant solely based on the experience that the company apparently gained in Petawawa, this finding would not be unreasonable in the circumstances.

[31] The Tribunal reiterates that, unless concrete and convincing evidence is received to the contrary, a government institution is entitled to rely on the information provided by any bidder.[31] In this case, there is insufficient information to suggest that H&H's proposal may not meet Mandatory Technical Criterion 2 and to cast doubt on PWGSC's determination of its compliance.

[32] The Tribunal gives no weight to the allegations based solely on the perception that the winning bidder does not have the minimum experience required, on which PAS has relied in this case.[32] A complaint must be better substantiated before the Tribunal can act. In the absence of more information in this case, the Tribunal finds no material basis to commence an inquiry into this matter.[33]

The second ground of complaint relates to contract administration

[33] With respect to the second ground of complaint, PAS submits that H&H does not have the necessary equipment to implement its contract. In support of this allegation, PAS relies on the

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29 *Accruent | VFA Canada Corporation* (15 December 2020), PR-2020-059 (CITT) at para. 16.

30 For example, PWGSC's communications left no doubt as to its interpretation that the total runway length for the purposes of Mandatory Technical Criterion 2 included the length of the "runway overrun" and that, therefore, the Petawawa aerodrome runway length exceeded 3,400 feet. Based on this determination, the bidders could reasonably understand that the experience at the Petawawa base met Mandatory Technical Criterion 2 if it had been acquired in a timely manner.

31 *Enveloppe Concept Inc. v. Department of Public Works and Government Services* (14 January 2022), PR-2021-042 (CITT) [*Enveloppe Concept*] at para. 46; *Access Corporate Technologies Inc. v. Department of Transport* (14 November 2013), PR-2013-012 (CITT) at para. 43. See also *Lions Gate Risk Management Group v. Department of Public Works and Government Services* (18 December 2020), PR-2020-024 (CITT) at para. 37.

32 Exhibit PR-2022-051-01 at 6.

33 *SoftSim Technologies Inc. v. Department of Public Works and Government Services* (4 November 2020), PR-2020-032 (CITT) at para. 14; *Veseys Seeds Limited, doing business as Club Car Atlantic v. Department of Public Works and Government Services* (10 February 2010), PR-2009-079 (CITT) at para. 9; *Flag Connection Inc. v. Department of Public Works and Government Services* (25 January 2013), PR-2012-040 (CITT) at para. 35.

requirements of the DND Handbook entitled "Airfield Snow and Ice Control," Appendix B-BG-238 000/AG-002, volume 2. The Tribunal concludes that this is a matter of contract administration, which is outside its jurisdiction.

[34] In support of its allegation, PAS submits that, 10 days after the contract award, on October 24, 2022, H&H had not yet moved its equipment to the Petawawa aerodrome. According to PAS, this indicates that H&H "does not have the equipment required to meet the requirements of the contract"[34] [translation].

[35] In this regard, the Tribunal finds that the requirements set out in Annex A are not mandatory under the evaluation criteria or the terms of the solicitation relating to the selection of the contractor, but rather are requirements relating to the performance and therefore the administration of the contract *after* it has been awarded. The requirement related to the equipment, and the reference to the DND manual referred to by PAS, are found in Article 9.7 of the clauses of the resulting contract included in the RFP, which provides as follows:

> **PART 7 – RESULTING CONTRACT CLAUSES**
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> …
>
> **ANNEX "A"**
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> **STATEMENT OF WORK**
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> …
>
> 9.0 Equipment
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> 9.7 Heavy Duty Snow Blowers. The Contractor must provide Heavy Duty, high performance snow blowers, loader and/or prime mover mounted blower head. In accordance with Airfield SNIC Volume 2, Chapter 4, 12-14, Snow blower must meet the following criteria …

[36] Since these terms are related to the resulting contract, they concern requirements related to the work that the contractor will have to perform after the contract award rather than the procurement process as such. These are clearly requirements related to the administration of the resulting contract.[35]

[37] Contract administration is a separate phase that takes place after the procurement process is completed. It deals with issues that arise as a contract is performed and managed. Matters of contract administration are beyond the scope of the Tribunal's jurisdiction,[36] which is limited to matters

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34 Exhibit PR-2022-051-01 at 6.

35 *Enveloppe Concept* at para. 38.

36 *Atlantic Catch Data Ltd. v. Department of Public Works and Government Services* (29 March 2018), PR-2017-040 (CITT) at para. 52; *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 32; *HDP Group Inc.* (28 December 2016), PR-2016-047 (CITT) at para. 10; *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 36; *Flag Connection Inc.* (9 January 2013), PR-2012-038 (CITT) at paras. 35, 36; *Airsolid Inc.* (18 February 2010), PR-2009-089 (CITT) at paras. 13–16; *Auto Light Atlantic Limited* (20 January 2010), PR-2009-073 (CITT) at para. 17; *Solartech Inc.* (16 October 2007), PR-2007-058 (CITT).

concerning "the procurement process" that relates to a designated contract.[37] The Tribunal has consistently taken the view that the procurement process commences after an entity has decided on its procurement requirements and continues through to the award of the contract.[38]

[38] For these reasons, the Tribunal concludes that this ground of complaint is unfounded, as it raises issues of contract administration, which are outside the Tribunal's jurisdiction.

DECISION

[39] Pursuant to subsection 30.13(1) of the CITT Act, the Tribunal has decided not to conduct an inquiry into the complaint.

Georges Bujold

Georges Bujold
Presiding Member

37 Subsection 30.11(1) of the CITT Act.

38 *Valcom Consulting Group Inc. v. Department of National Defence* (14 June 2017), PR-2016-056 (CITT) at para. 32; *ML Wilson Management v. Parks Canada Agency* (6 June 2013), PR-2012-047 (CITT) at para. 36; *Siva & Associates Inc.* (30 March 2009), PR-2008-060 (CITT) at para. 8; *Novell Canada Ltd.* (17 August 2000), PR-98-047R (CITT) at 6, 7.